IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1764 OF 2006

Western Outdoor Interactive
Private Limited .. Petitioner.

V/s.

A.K. Phute, Income-tax Officer,
Ward 2(3)(4), Mumbai & Others .. Respondents.

Mr.F. Irani with Mr.A.K. Jasani for the petitioner.

Mr.A.M. Kotangale for the respondents.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATED : 5TH SEPTEMBER, 2006.

ORAL ORDER (Per H.L. Gokhale, J.) :

1. Heard Mr.Irani with Mr.Jasani for the petitioner. Mr.Kotangale appears for the respondent.

2. The petitioner herein is a private limited company engaged in the business of production, development and export of computer software. The petitioner has two establishments, one is in the Santacruz Electronics Export Processing Zone (for short 'SEEPZ') and another establishment situated in the Fort area of Mumbai which is outside the SEEPZ area. The petitioner is seeking to challenge the notice dated 1st

March, 2006 issued by the Assistant Commissioner of Income Tax under section 148 of the Income Tax Act, 1961 seeking to reopen the assessment for the assessment year 2000-01.

3. The petitioner had filed their return for this year on 28th November, 2000 returning a total income of Rs.22,63,320/-. The return was accompanied by the computation of income, audited accounts under the Companies Act, 1956, audited report as required under Section 44AB of the Income Tax Act, 1961, report under section 80 HHE of the Income Tax Act and separate profit and loss account and balance sheet for the SEEPZ unit and for the Fort unit. The return filed by the petitioner was assessed and an order was passed on 28th January, 2003 under Section 143(3) of the Income Tax Act. The first respondent - Income Tax Officer allowed deduction in respect of the Fort unit to the tune of Rs.5,21,74,398/- as against the claim of Rs.5,50,54,680/- made by the petitioner.

4. It so happened that lateron in January, 2004 certain audit objections were raised in respect of these assessments. A notice was issued to the petitioner to show cause as to why the assessment order should not be rectified on the basis of the audit objection under section 154 of the Income Tax At. It was alleged in the

audit objection that the deduction which had been allowed in respect of the Fort unit was erroneous. It was alleged that an excessive deduction had been worked out by taking a lesser total turnover of Rs.9,85,43,319/- and that it should have been Rs.10,95,89,191/-. The petitioner filed their reply but that was without any effect and the objections were rejected. Accordingly, an order of rectification was passed on 9th December, 2004 under section 154 of the Income Tax Act. Two corrections were directed, one was that as far as the retainer fees were concerned, the distribution of the amount of Rs.8,76,011/- was wrongly done by allocating 18.30% to the SEEPZ unit and that it should have been 8.86%. The second correction directed was that while calculating the deduction under section 80 HHE, the total turnover should have been Rs.10,95,89,191/- and not Rs.9,85,43,319/-.

5. The petitioner filed appeal against the order dated 9th December, 2004 passed under section 154 to the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) entertained this appeal filed by the petitioner and by her order passed on 2nd November, 2005 cancelled the aforesaid order dated 9th December, 2004 passed under section 154.

6. The petitioner thought that in view of this

order infact the chapter was closed but that was not so. Now, the petitioner has received a notice dated 1st March, 2006 seeking to reopen the assessment under section 148 of the Income Tax Act and it is this notice which is sought to be challenged in the present petition.

7. However, prior to the filing of the petition and after receiving this notice, the petitioner sought reasons therefor and filed objections on 3rd March, 2006. The reasons have been communicated by further communication dated 30th May, 2006 to justify the reopening. The reasons given in this communication are as follows :

> "As requested by your representative M/s.S.N. Kapoor & Co., C.A. vide above referred letter, the reasons for reopening assessment for the A.Y. 2000-01 are provided herein below :
>
> i) While calculating the quantum of deduction under section 80 HHE, the total turnover has been adopted at Rs.9,85,43,390/- as against correct figure of Rs.10,95,89,191/- resulting thereby in excess allowance of deduction u/s.80 HHE of the I.T. Act.
>
> ii) Similarly, while working out the quantum of deduction u/s.10B of the I.T. Act, the expenses on account of retainer fees has been allocated between two units @ 18.30% instead of correct ratio @ 8.86% worked out in relation to export income".

Thereafter, the objections have been rejected by

a further order dated 2nd June, 2006.

8. Mr.Irani, learned counsel appearing for the petitioner submitted that once the department sought to rectify the alleged mistake by resorting to section 154 of the Income Tax Act and that order was set aside by the Commissioner of Income Tax (Appeals), that itself was sufficient for the department to realise that its approach was erroneous. In any case, if section 147 was to be applied, the reopening had to be done within four years. In the present case, admittedly, it is beyond four years and, therefore, the proviso to section 147 will get attracted. This proviso lays down that such a reopening would be permissible if it is for the failure on the part of the assessee to make a return under section 139 or in response to a notice under section 142(1) or section 148 or failure to disclose fully and truly all material facts necessary for the assessment. In the present case, he points out that the petitioner had disclosed all the material facts and as to how it had sought the benefit under section 10B of the Income Tax Act for the SEEPZ unit and under section 80 HHE for the Fort unit. This was not the case of any new discovery on the part of the department nor that the petitioner had kept back any information to allege failure on their part to make a full and true disclosure of the material facts. In his submission all that the

department had done was to apply a different yardstick which in his submission was impermissible.

9. He submitted that the grounds given in justification of the reasoning were not available to the department. The first ground was that while calculating the quantum of deduction under section 80 HHE, the total turnover had been shown to be lesser one. He explained as to how this figure of Rs.9,85,43,390/- was claimed by the assessee. He pointed out that this figure had been disclosed in the calculations which the petitioner had filed to claim deduction under section 80 HHE. According to him, this figure should be Rs.9,85,43,319/- and not Rs.9,85,49,390/-. That apart, all that the department had done was to add the three figures with respect to the calculations under section 80 HHE i.e. (1) income from services (export), (2) domestic sales and (3) exchange fluctuations. These three figures were Rs.10,75,64,683/-, Rs.44,768/- and Rs.19,79,560/-. All these three figures were from the documents which the petitioner has supplied. Now, the department was saying that the calculations had to be done for both the two units together and, therefore, they arrived at a figure of Rs.10,95,89,191/-. Mr.Irani submitted that surely it was a matter of looking at the same transaction from another point of view. This could not be said to be something for which the assessee was responsible or that

he has not disclosed the material facts.

10. Similarly, as far as the second ground goes, while looking at the account of the retainer fees, the department had alleged that the petitioner had allocated only 8.86% to the SEEPZ unit instead of 18.30%. According to Mr.Irani, the petitioner would have benefited if they were to allocate 18.30% to SEEPZ but in any case this is again a matter of calculation and the figures were available to the respondents on the record which the petitioner had submitted.

11. Mr.Irani drew our attention to the judgment of the Apex Court reported in 159 ITR 956 in the case of Indian Oil Corporation V/s. Income Tax Officer, Central Circle, Calcutta and others. The Apex Court has explained as to in what circumstances, the jurisdiction under section 147 to reopen the assessment beyond four years would be available. The relevant observations in the judgment are as follows :

> (a) **<u>On page 967 of 159 ITR</u>**
> "The principles on this branch of law are well-settled.
> To confer jurisdiction under clause (a) of section 147 of the Act beyond the period of four years but within a period of eight years from the end of the relevant year under section 148 of the assessment year, two conditions were required to be fulfilled : the first is that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to tax had been underassessed or escaped assessment; the second was that he must

have reason to believe that such escapement or underassessment was occasioned by reason, so far as relevant for the present purpose, to disclose fully and truly all material facts necessary for the assessment of that year. Both these conditions are conditions precedent to be satisfied. See, in this connection, the observations of this court in Calculla Discount Co. Ltd. v. ITO [1961] 41 ITR 191".

(b) On page 970 Of 159 ITR

"As is well-settled now by the several authorities of this court and of several High Courts, there must be materials to come to the conclusion that there was 'omission or failure to disclose fully and truly all material facts necessary for the assessment of the year'. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for the assessment. Therefore, an obligation is to disclose facts; secondly, those which are material; thirdly, the disclosure must be full and fourthly, true. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, for computing or determining the proper tax due from the assessee, it is necessary to know all the facts which help the assessing authority in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as to certain other facts. But on the primary facts, it is for the taxing authority to draw inferences. It is not necessary for the assessee to draw inferences for him. See, in this connection, the observations in Calcutta Discount Co. Ltd.'s case [1961] 41 ITR 191 (SC)".

12. Mr.Irani has drawn our attention to a number of judgments rendered by different Division Benches of this Court and particularly one in the case of Bhogawati Sahakari Sakhar Karkhana Limited V/s. Deputy Commissioner of Income Tax & Others reported in 269 ITR 186. This was a matter concerning non-refundable

deposits from the sugarcane price. The assessment of the sugar co-operative society was sought to be reopened on the ground that full disclosure had not been made. The Court found that the figures which the assessing officer was relying upon were disclosed in the returns. The Court held that when all the basic facts with material particulars were disclosed by the assessee in its return for the relevant assessment year and all the account books were also made available at the time of assessment, no failure on the part of the assessee to fully disclose the material facts could be alleged.

13. Mr.Kotangale, learned counsel appearing for the respondent, on the other hand, submitted that the assessee was in error in applying the two sections 80HHE and 10B separately to the two units and that the department was right in clubbing the two units and insisting that the total turnover ought to have been taken at Rs.10,95,89,191/-. Similarly, the retainer fees is concerned, the submission was that the petitioner had not allocated the retainer fees correctly to the two units and it shows lesser percentage for the SEEPZ unit. He submitted that in such a situation if the income has escaped, the officer is entitled to reopen the assessment.

14. We have noted the submissions of both the

counsel. The submission of Mr.Kotangale could have been accepted, if there was any failure on the part of the petitioner - assessee in giving appropriate information. His reliance on the judgment of Punjab and Haryana High Court in the case of Pal Jain V/s. Income-Tax Officer and another reported in 267 ITR 540 is also misplaced. That was a case where subsequent information had been received by the department and, therefore, the reopening of the assessment was upheld by the High Court. In the present case, no subsequent information has been obtained by the department. It is clearly a case of applying different yardstick. It is possible to say that two views are possible on a certain situation. However, the department chose to take one view. That view was sought to be corrected but the Commissioner of Income Tax (Appeals) confirmed the view which the Assessing Officer had taken earlier. In a situation like this, to say that the view taken by the department subsequently is the correct one and, therefore, to reopen the assessment is clearly an afterthought and something beyond the provisions of what section 147 provides.

15. In the facts of the present case, therefore, the reopening was not called for. The impugned notice dated 1st March, 2006 seeking to reopen the assessment was without jurisdiction and beyond the parameters of the

provisions of section 147.

16. For the reasons stated above, we quash and set aside the notice. Rule is made absolute. No order as to costs.

sd/-

(H.L. GOKHALE, J.)

sd/-

(J.P. DEVADHAR, J.)